

IN THE COURT OF APPEALS OF THE STATE OF IDAHO

Docket No. 34525

STATE OF IDAHO,	)	2008 Unpublished Opinion No. 614
	)	
Plaintiff-Respondent,	)	Filed: August 25, 2008
	)	
v.	)	Stephen W. Kenyon, Clerk
	)	
DON KELLY COLE,	)	THIS IS AN UNPUBLISHED
	)	OPINION AND SHALL NOT
Defendant-Appellant.	)	BE CITED AS AUTHORITY
	)	

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Appeal from the District Court of the Third Judicial District, State of Idaho, Adams County. Hon. Gordon W. Petrie, District Judge; Hon. A. Lynn Krogh, Magistrate.

Appellate decision of district court affirming judgment of conviction for resisting an officer, affirmed.

David L. Posey, Payette, for appellant.

Hon. Lawrence G. Wasden, Attorney General; Daniel W. Bower, Deputy Attorney General, Boise, for respondent.

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LANSING, Judge

Don Kelly Cole appeals from his misdemeanor conviction for resisting and obstructing officers. He contends that the magistrate erred by denying his proposed jury instruction, that his actions did not violate the statute as a matter of law because the officers had no probable cause to arrest him, and that the magistrate erred by imposing a term of probation requiring that he complete a marital counseling class. We affirm.

**I.**

**FACTS AND PROCEDURE**

Cole was charged with two misdemeanors, domestic battery, Idaho Code § 18-918,<sup>1</sup> and resisting and obstructing officers, I.C. § 18-705. The following facts were adduced at trial.

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<sup>1</sup> Because of the injuries to his wife, Cole was originally charged with a felony violation of I.C. § 18-918 in the presence of a child. Before the trial the prosecution amended the complaint to charge a misdemeanor violation of the statute.

Cole and his wife Vicki had an argument that lasted two days. Cole would attempt to escape by driving away in his pickup, but Vicki would repeatedly follow him in her pickup. On the day of Cole's arrest, Cole wanted to go fishing with his son. To prevent her from following them and to provide a running chance to get away, Cole disabled Vicki's pickup by disconnecting a wire in the engine so that the vehicle would not start. Vicki called a mechanic to come and replace the wire. The mechanic left without doing so, because Cole told him to leave the property and because the combatants' argument was still in full force.

In retaliation, Vicki decided to disable Cole's pickup. She hit a side "wing" window on the door of the vehicle with her hand so she could reach through, unlock the door, pop the hood latch and disconnect one of the pickup's engine wires. When she was unsuccessful in this endeavor, Vicki picked up a rock to throw at the pickup, telling Cole to fix her vehicle or she would disable his with the rock. Cole declined the offer. Instead, he defended his truck by placing himself between it and Vicki and swinging his arms in an attempt to deflect the rock, but was unsuccessful. Vicki threw the rock past Cole's head and broke the windshield and later reloaded and hit the pickup with a second rock. The couple's son called the police. When the officers arrived, Cole was sitting on his wife's back, pinning her arm behind her. Cole admitted to the officers that during the altercation he had pushed Vicki and at one point he was holding her by the neck area. Vicki had injuries, including a large scrape on her right shoulder, bruises on her arms and redness around her neck.

The officers decided to arrest Cole for domestic battery and informed him of their intent. Cole refused to be arrested due to his belief that he was in the right in defending his truck, and he initially took a fighting stance, telling the officers, "Let's go." Knowing Cole well, the officers declined to physically restrain him, choosing instead to try to talk him into complying. Cole remained resistant, however, and eventually walked away from the officers and up a hill. After numerous unsuccessful attempts to talk him down, the officers left. Cole later appeared in court in response to a summons.

Cole was acquitted by a jury on the domestic battery charge but was convicted on the resisting and obstructing charge. The magistrate sentenced Cole to one hundred eighty days in jail with the first one hundred sixty-eight days suspended and placed him on two years' probation. As a term of probation, the magistrate ordered that Cole attend twenty-four hours of

marital counseling.<sup>2</sup> Cole appealed to the district court, and the magistrate stayed the execution of sentence pending appeal.

The district court affirmed the conviction and the term of probation. Cole now appeals to this Court.

## II. ANALYSIS

### A. Jury Instruction

At trial, Cole's defense theory was that the officers' attempt to arrest him was unlawful because there was no probable cause to arrest him for domestic battery. Accordingly, Cole asserts that the magistrate erred by refusing to give his proposed jury instruction that stated:

The Defendant has the right to resist without violence an officer who conducts an unlawful arrest, detention and or criminal investigation.

The Court further instructs you if the arrest is unlawful, the Defendant has the right to resist, obstruct or oppose without violence such unlawful arrest.

Cole argues that by failing to give this instruction the magistrate "deprived the Defendant of presenting his main defense to the charge, that being that he had the right to disobey the officer if the officer was exceeding his authority and the Defendant could disobey without the use of violence."

Whether a jury has been properly instructed is a question of law over which we exercise free review. *State v. Gleason*, 123 Idaho 62, 65, 844 P.2d 691, 694 (1992). When reviewing jury instructions, we ask whether the instructions as a whole, and not individually, fairly and accurately reflect applicable law. *State v. Bowman*, 124 Idaho 936, 942, 866 P.2d 193, 199 (Ct. App. 1993). A trial court is not required to give a requested instruction, even one that is a correct statement of the law, if the subject matter is sufficiently covered by instructions actually given to the jury. *State v. Macias*, 142 Idaho 509, 511, 129 P.3d 1258, 1260 (Ct. App. 2005); *State v. Ward*, 135 Idaho 400, 402, 17 P.3d 901, 903 (Ct. App. 2001); *State v. Patterson*, 126 Idaho 227, 230, 880 P.2d 257, 260 (Ct. App. 1994).

The statute under which Cole was charged, I.C. § 18-705, provides:

Every person who wilfully resists, delays or obstructs any public officer, in the discharge, or attempt to discharge, of any duty of his office . . . is

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<sup>2</sup> Vicki pleaded guilty to a misdemeanor charge of disturbing the peace.

punishable by a fine not exceeding one thousand dollars (\$1,000), and imprisonment in the county jail not exceeding one (1) year.

The word “duty,” as used in this statute, encompasses only lawful and authorized acts of a public officer. *State v. Hollon*, 136 Idaho 499, 502, 36 P.3d 1287, 1290 (Ct. App. 2001); *State v. Wilkerson*, 114 Idaho 174, 180, 755 P.2d 471, 477 (Ct. App. 1988). Consequently, where an individual refuses to obey an unlawful order or peacefully obstructs an act of a public officer that is contrary to the law, be it statute or constitution, that individual does not violate section 18-705. *State v. Hallenbeck*, 141 Idaho 596, 599, 114 P.3d 154, 157 (Ct. App. 2005); *State v. Wiedenheft*, 136 Idaho 14, 16, 27 P.3d 873, 875 (Ct. App. 2001).

Thus, Cole’s requested instruction is a correct statement of the law. However, other instructions conveyed the necessary information to the jury. The jury was instructed that in order to convict Cole, they must find, among other elements, that he willfully resisted and obstructed the officer “[i]n the discharge, or attempt to discharge, any *duty* of [the officer’s] office.” (Emphasis added.) The jury was further instructed that “[t]he word ‘duty’ includes only the lawful and authorized acts of a public officer.”

From the instructions given, Cole was free to argue, and did argue, that because no probable cause existed to arrest him, the officer’s attempted arrest was therefore unlawful and his passive resistance to that attempted arrest did not violate the statute. The jury instructions given fairly and accurately reflected the applicable law on this issue and, contrary to Cole’s assertion on appeal, the refusal of his superfluous proposed jury instruction did not deprive him of his chosen defense. The district court’s appellate decision rejecting Cole’s claim of reversible error on this issue is affirmed.

## **B. Sufficiency of the Evidence**

Cole next contends that under the facts adduced at trial, including his acquittal on the domestic battery charge, the arrest was necessarily made without probable cause and therefore, as a matter of law, his conviction for resisting and obstructing cannot be sustained.

Evidence is sufficient to support a conviction if there is substantial, even if disputed, evidence from which a reasonable juror could find all the elements of the crime proven beyond a reasonable doubt. *Hollon*, 136 Idaho at 501, 36 P.3d at 1289. Idaho Code § 19-603(6) authorizes a warrantless arrest by a peace officer “[w]hen upon immediate response to a report of a commission of a crime there is probable cause to believe, that the person arrested has committed a violation of section . . . 18-918 (domestic assault or battery) . . . .” The requirement

of probable cause does not mean that arresting officers must have sufficient evidence to secure a conviction. Rather, the test is whether “the facts and circumstances within [the officers’] knowledge and of which they had reasonably trustworthy information were sufficient to warrant a prudent man in believing that the [suspect] had committed or was committing an offense.” *Hollon*, 136 Idaho at 502, 36 P.3d at 1290 (citations omitted). The probable cause analysis is unaffected by an ultimate acquittal of the charge. *Id.* at 502 n.1, 36 P.3d at 1290 n.1.

Here, the officers responded to a domestic violence call. When they arrived, Cole was sitting on his wife’s back, pinning her arm behind her. Cole admitted to the officers that he had pushed Vicki, and at one point he was holding her by the neck area. Vicki had injuries, including a large scrape on her right shoulder, bruises on her arms and redness around her neck. This provided probable cause to arrest Cole for domestic battery. The district court’s appellate decision rejecting Cole’s claim of reversible error on this issue is affirmed.

#### **C. Term of Probation**

The magistrate ordered that Cole attend twenty-four hours of marital counseling as a term of probation. On intermediate appeal, the district court found no error. In his brief to this Court, Cole asserts in a conclusory fashion that this term of probation is improper because he was acquitted on the domestic violence charge. He cites no authority and makes no argument, however, as to why a requirement of counseling is impermissible as a term of probation following a conviction for resisting an officer. Because Cole cites no authority in support of this claim of error, we do not address it. *State v. Zichko*, 129 Idaho 259, 263, 923 P.2d 966, 970 (1996). The district court’s appellate decision rejecting Cole’s claim of reversible error on this issue is affirmed.

### **III.**

#### **CONCLUSION**

The district court’s appellate decision affirming the judgment of conviction is affirmed.

Chief Judge GUTIERREZ and Judge PERRY **CONCUR.**